PUBLIC PROSECUTOR v. TENGKU MAHMOOD ISKANDAR & ANOR.

[A.Cr.J. (Raja Azlan Shah J.) January 3, 1973]

[Johore Bahru — Criminal Appeals Nos. 29, 30 and 32 of 1972]

Criminal Law and Procedure — Appeal — Sentence — Position of accused — Equality before the law — Federal Constitution, Arts. 5 and 8.

This was an appeal against sentence. The respondent had been convicted on charges of causing hurt. The learned President of the Sessions Court had made an order binding him over under section 173A of the Criminal Procedure Code, having taken into consideration the fact that the respondent was a prince of the Ruling House of Johore.

Held: in this case the sentences imposed by the lower court did not reflect the gravity of the offences and therefore the sentences must be set aside and a more suitable sentence imposed on the respondent.

MAGISTRATE'S CRIMINAL APPEAL.

Tan Sri Salleh Abas (Solicitor-General) for the Public Prosecutor.

P. Suppiah for the respondent.

Raja Azlan Shah J. (delivering oral judgment): Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales *i.e.* the interest of the accused person and the interest of the community, then I must say justice is just. The aim of justice must be balance and fairness. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament. We must keep the balance true. It is against that background that I must consider the present appeals.

I will deal with these appeals in chronological order. I commence with Criminal Appeal No. 32/72. Lt. Hussin bin Haji Othman was charged with abetting Tengku Mahmood under section 323 of the Penal Code. He was discharged under section 173A of the Criminal Procedure Code (F.M.S. Cap. 6) and bound over in the sum of $500 with one surety for a period of one year. The appeal is against sentence. The facts are there on record and it is not necessary for me to repeat them. It is quite obvious that Tengku Mahmood was his superior officer, a major in the Johore Military Forces. He was in fact the aide-de-camp to the major. His superior officer had ordered him to get those articles and in obedience to the order he had obtained them. Although he did not take any part in the assault, he had lent passive assistance to the commission of the offence. As was correctly stated by the learned president, the facts were well known to him that the order to fetch a copy of the Holy Book, his "buloh" and gas cannisters could not have been for the use of his superior officer to enable him to play polo but for use in the commission of an offence. Therefore the order was clearly illegal. Now a soldier is not protected where the order is grossly illegal. The only superior to be obeyed is the law and no superior is to be obeyed who dares to set himself above the law. However, it must be appreciated that he was a young man and considering the circumstances he was in, I have no hesitation in saying that he might have had an exaggerated notion of his duties. In the circumstances I cannot treat this case in the same way as in the other appeals. I think the sentence was adequate.

Now I deal with the appeals against Tengku Mahmood.

With regard to Criminal Appeal No. 29/72, the respondent was charged with causing hurt to Francis Joseph Puthucheary and Puthenpurakai Joseph s/o Verghese under section 323 of the Penal Code. The learned president ordered the respondent to enter into a bond under section 173A of the Criminal Procedure Code in the sum of $300 with one surety for each charge for a period of one year. I do not wish to read the facts which have been recorded. It was obvious that the act committed by the respondent was generated by the heat of the insulting behaviour of the complaintants. He had taken the law into his hands; that was a mistake on his part; but it was a significant mistake. I do not think the learned president has erred in making the order for the respondent to enter into a bond under section 173A of the Criminal Procedure Code. The fact that the respondent was a first offender had to be considered. I therefore dismiss the appeal against sentence.

I now take together Criminal Appeals No. 30 and No. 31 of 1972. These are also appeals against sentence. In Criminal Appeal No. 30 of 1972 the respondent was charged with causing hurt to Mr. Narendran s/o Manickam under section 323 of the Penal Code. The respondent was bound over under section 173A of the Criminal Procedure Code for one year in the sum of $600 with one surety. I am quite acquainted with the facts on record. It is significant to note that the act was committed on 13th March, 1972, some 8 days after that of Criminal Appeal No. 29 of 1972. However the facts in Criminal Appeal No. 30 of 1972 paled in comparison when we consider the facts of the next case, *i.e.* Criminal Appeal No. 31 of 1972. The record, to my mind, reads more like pages torn from some mediaeval times than a record made within the confines of a modern civilization. The keynote of this whole case can be epitomised by two words — sadistic brutality — every corner of the case from beginning to the end, devoid of relief or palliation. I have searched diligently amongst the evidence, in an attempt to discover some mitigating factor in the conduct of the respondent, which would elevate the case from the level of pure horror and bestiality; and ennoble it at least upon the plane of tragedy. I must confess, I have failed. It is said in Criminal Appeal No. 31 of 1972 that the complainants were involved in smuggling goods into this country. Were they 10 times involved, or were they 100 times involved, that did not justify the respondent to inflict brutal third-degree practices on the three of them. The law is sedulous in giving them the right to a fair trial and to be defended by counsel. Those fundamental rights must always be kept inviolate and inviolable, however crushing the pressure of incriminating proof. Cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber

must not be substituted for the witness stand. That right is enshrined in our Constitution — "No person shall be deprived of his life, or personal liberty save in accordance with law." That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression.

Normally an appellate court is reluctant to interfere with sentence imposed by a lower court. But it is bound to do so whenever it feels that justice does not appear to have been done. In Criminal Appeals No. 30 and No. 31 of 1972 I am of the view that the learned president had weighed too heavily in favour of the respondent. This is what he said in his judgment:

"Before passing sentence, counsel for the prosecution addressed the court and stated, among other things, that a just and fair sentence was required and urged that the interest of the public as well as the position of the accused must be taken into account by the court. 'Position of the accused' in this context could only mean the status of the accused as a Prince of the ruling house of the State of Johore, the fact that he is the eldest son of His Highness the Sultan of the State of Johore which is a component part of the States of Malaya, that fact that the title of Raja Muda of Johore had been conferred on him and that the accused held a rank of importance in the Johore Military Forces."

He had thereby conflicted with the provisions of article 8 of our Constitution which says that all persons are equal before the law. That implies that there is only one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimizes tyranny.

It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance. In my judgment the sentence imposed by the learned president did not reflect the gravity of the offence and I here and now set aside the sentence imposed by the lower court in respect of these 2 appeals, and substitute them as follows: —

Criminal Appeal No. 30/72, fine of $500 in default 2 months imprisonment; conviction to be recorded.

Criminal Appeal No. 31/72, First charge. I impose a fine of $1,000 in default 3 months imprisonment; conviction to be recorded.

In respect of second and third charges, I impose a fine of $500 each in default 3 months imprisonment; conviction to be recorded.

Orders accordingly.

TOK JWEE KEE v. TAY AH HOCK & SONS LTD. & ANOR.

[O.C.J. (Abdul Hamid J.) January 13, 1973]

[Johore Baharu — Civil Suit No. 213 of 1965]

Local Authority — Allegation that building plans were approved by Town Council contrary to provisions of Town Boards Enactment — Whether Town Council liable to owner of adjoining land — Liability of owner of land on which building is built — Town Boards Enactment (Johore No. 118), s. 145 — Building Bye-Laws 1973, bye-law 46.

In this case the plaintiff owned a bungalow on land in Johore Bahru. The first defendant owned a piece of land on the boundary of the plaintiff's land and had obtained approval to erect a block of four storey building, the plans for which were approved by the Town Council, Johor Bahru. The plaintiff claimed a declaration that the approval of the building plans by the Town Council was illegal and inoperative or in the alternative that the approval of the building plan was null and void as being *ultra vires* and was approved contrary to the rules of natural justice. He also claimed damages against the Town Council and the owner of the land on which the building was built. It was also alleged that there had been a breach of the building bye-laws and the plaintiff claimed damages arising from this breach. On a preliminary objection the High Court had held that even assuming the approval of the building plans by the Town Council was wrong, the plaintiff had no cause of action. An appeal against this ruling was allowed by the Federal Court ([1969] 1 M.L.J. 195) and it was ordered that the case be remitted back to the High Court for retrial of the issues of fact and determination of suit.

Held: (1) the onus was on the plaintiff to establish that there had been a breach of section 145 of the Town Board Enactment and on the evidence he had failed to discharge the burden, as the approved zoning plan showed that the building approved came within the class of building that may be permitted by the Town Council;

(2) the first defendant had committed a breach of bye-law 46 of the Town Boards Enactment in that he had failed to construct any effective hoarding sufficient to protect the public. He had also failed to comply with bye-law 46 and in the circumstances of the case was also negligent;

(3) on the evidence the plaintiff was entitled to damages of $1,505 against the first defendant.

Cases referred to:-

(1) *Tok Jwee Kwee* v. *Tay Ah Hock & Sons Ltd. & Anor.* [1969] 1 M.L.J. 195.

(2) *Ipoh Town Council and another* v. *Ng Khoon Khoon* [1960] M.L.J. 227.

(3) *District Council, Central, Province Wellesly* v. *Yeggapan* [1966] 2 M.L.J. 177.

CIVIL SUIT.

Datuk S. P. Seenivasagam for the plaintiff.

P. M. Williams for the first defendant.

Datuk D. C. Jackson for the second defendant.

Abdul Hamid J.: Tok Kwee Kee owns a bungalow in which he and his family occupy on Lot 6232 Certificate of Title No. 3978 known as No. 56-H, Jalan Ibrahim Sultan, Johore Baru. The first defendant owns a piece of land on the eastern boundary of the plaintiff's land. Both pieces of land are within the jurisdiction of the Johor Baru Town Council. When this action was instituted the first defendant was in the course of erecting on his land one block of four-storey building which building has since been completed. The first defendant received approval of the building plans on January 31 and June 8, 1965.